



REPUBLIC OF KENYA



Crysenyum Investments Limited v Nthiga & 3 others (Environment and Land Case 55 of 2021) [2024] KEELC 52 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEELC 52 (KLR)

FOMERLY ELC MSA NO. 190 OF 2020

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT AND LAND CASE 55 OF 2021

AE DENA, J

JANUARY 22, 2024

BETWEEN

CRYSENTHUM INVESTMENTS LIMITED PLAINTIFF

AND

ALESILIS NJERU NTHIGA 1ST DEFENDANT

KENYA WOMEN MICRO FINANCE BANK LIMITED 2ND DEFENDANT

THE REGISTRAR OF LANDS KWALE 3RD DEFENDANT

NEMA MBWANA MJOMBA 4TH DEFENDANT

JUDGMENT

Plaint

1. The Plaintiff commenced these proceedings by way of plaint dated 15th October 2020. The Plaintiff aver that it is the owner and registered proprietor of Plot No. Kwale/Kidimu/269 (herein suit property) since October 1995 which it duly purchased and has been in possession of since then. That though the Plaintiff has never parted with the suit property, sometime in October 2020 it found that the same is registered in the name of Alesilis Njeru Nthiga the 1st Defendant and who had also charged it to Kenya Women Micro Finance Bank Limited, the 2nd Defendant for Kshs. 26 Million. It is averred that the transfer of the suit to the 1st Defendant was fraudulent and the particulars of the said fraud are set out in paragraph 14 of the Plaint. The Plaintiff seeks among others a declaration that it is the bonafide owner of the suit property.

Defence

2. The suit is defended by the 2nd and 3rd Defendant.



3. The firm of Onyango & Ameyo Advocates entered appearance for the 1st and 2nd Defendants on 17/11/20 together with grounds of opposition contending that the suit was an ownership dispute of the suit properties between the 1st, 3rd and 4th Defendants. That the 2nd Defendant is not a necessary party to the suit and which did not disclose a cause of action against it. Vide an application dated 16/2/201 the 2nd Defendants sought that the suit against them is struck out. The application was allowed by consent of the parties.
4. The 1st and 4th Defendants did not enter appearance following substituted service by advertisement in the Daily Nation on 15/6/21 pursuant to the leave of the court issued on 2/6/21. There is on record Affidavit of Service sworn by Fredrick E.O. Okanga filed on 18/6/21 confirming service.
5. The 3rd Defendant filed a Statement of Defence through the Attorney General's office on 19/01/21. The allegations of fraud are denied. The 3rd Defendants states that its statutory duties are to facilitate law and order in the registration of documents lodged at the lands office. That if there was a charge registered against the suit property the same was duly registered. That the reliefs sought against the 3rd Defendant are not merited.

The Hearing

6. The suit was heard on 8/5/23 (sic 9/5/23) and 29/5/23. The parties called one witness each.

The Plaintiffs Evidence

7. PW1 is Praful Khimchand Shah one of the Plaintiffs Directors. He adopted his witness statement dated 15/10/20 and also produced the documents listed in the Plaintiffs list of documents dated 15/10/20 in support as Pex 1-7. PW1 testified as follows; that a search by the Plaintiff shows that as at 2/08/2011 the suit property belongs to the Plaintiff. That the same became the Plaintiff company property on 17/10/1995 and which has never been sold since then. That in the year 2020 the Plaintiff with the intention of disposing the suit property discovered through its agent a discrepancy in the Green card which showed the 1st Defendant as the registered owner and was charged to the 2nd Defendant. That he had neither sold the suit property to the 1st Defendant nor authorized the charge. He prayed that the title reverts to the Plaintiff.
8. PW1 clarified on cross examination that the Plaintiff was incorporated on 20/1/1989 and not 28/1/89. That though not listed in the list of documents his authority to act for the Plaintiff was annexed to his supporting affidavit. That upon discovery of the discrepancy in the green card he reported the matter to the police and though he could remember the OB No. 6/16/N/2020 he did not present the same in court. That though the outcome of the investigations was that there was a finding of fraud he did not present the investigation report before court.
9. PW1 clarified in reexamination that the authority to prosecute the suit on behalf of the Plaintiffs was attached as PK5 in his supporting affidavit to the application dated 15/10/20 and which is part of the court record. The fraud was reported at Shimoni Police Station but he was not aware on any prosecutions therefrom. With this the Plaintiffs case was closed.

The Defendants evidence

10. DW1, Ms. Siema Mwanguni Land Registrar Kwale testified on behalf of the 3rd Defendant. She informed the court that they could not trace the green card in the parcel file. However, the file contained transfer registered on 5/11/2014 in the name of the 1st Defendant and she presumed a title deed was issued thereto and the transferor was Nema Mbwana Mjomba. That while there was a transfer dated



12/10/95 in favor of the Plaintiff, there was no transfer to show how the 4th Defendant became the owner of the suit property.

11. The witness produced the documents in the 3rd Defendants List of Documents dated 30/01/2023 (Dex 1-7) being copies of:-
 1. Title dated 28/10/2013
 2. Letter of Consent dated 9/10/1995
 3. Transfer dated 12/10/1995
 4. Cancelled title dated 8/6/1995
 5. Letter of Consent dated 9/5/1995
 6. Transfer dated 7/6/1995
 7. Cancelled title dated 10/5/1994
12. Upon cross examination DW1 reiterated she was not able to trace the green card for the suit property. That a search application must have attached to it a copy of the title. She conceded that certificate of official search dated 2/08/11 had entries number 5 & 6 bearing the plaintiffs name. The same seemed to have issued from the Land Registry since Mr. Marwanga had served as a land registrar at Kwale. That the entries in the green card produced by the Plaintiff started from 9-12 meaning there were previous entries. That there was a possibility of fraud owing to the absence of transfer to the 4th Defendant. The witness conceded that there can be no two titles against the same property and that one must be fake. She informed the court that upon service of the suit papers herein the then land registrar Mr. Safari who no longer works with the Ministry summoned the parties but there was no record to show what transpired thereafter.
13. On cross examination the witness clarified the parties summoned by Mr. Safari were the 1st and 4th Defendants and which was the right thing for the registrar to have done. At this juncture the 3rd Defendants case was closed.

Submissions

14. Parties above filed and exchanged submissions which I have considered in preparing this judgement. The gist of the Plaintiffs submissions is that the Plaintiff has proved its case against the defendants on a balance of probabilities. That most of the documents produced by DW1 support the Plaintiffs case and how the Plaintiff acquired the suit property.
15. The 3rd Defendant referred this court to Article 40 of *the Constitution* on the right to own property, section 26 of the *Land Registration Act* on infeasibility of title and the grounds upon which title can be impeached. That the 4th Defendants title can be contested since there were no records to show how it was acquired by the said Nema Mbwana Mjomba. That the Plaintiff had discharged the burden of proof as to the ownership of the suit properties based on the Plaintiffs documents produced in court and which also explained the root of the Plaintiffs title. That the missing green card from the parcel file and existence of two titles on the suit property depicted possible fraud and that one title must be fake. It is submitted when two equities are equal, the first in time shall prevail. It finally submitted that the land registry did not participate in the fraud and immediately they were served, the Land Registrar rolled out mechanism to rectify the improprieties.



Analysis and Determination

16. Having considered all the foregoing, the issue for determination is whether the Plaintiff has proved its case to the required standard and whether it is entitled to the orders sought.
17. The plaintiff's case is that it is at all material times the registered owner of the suit property. However sometime in the year 2020 it discovered that the 1st Defendant is the registered owner of the suit property having been registered as such in the year 2014. That the said registration was without knowledge and involvement of the Plaintiffs and which he states was fraudulent.
18. It is trite that he who alleges must prove. See section 107 and 109 of the *Evidence Act* Chapter 80 of the Laws of Kenya. The burden of proof lay upon the Plaintiff to prove that they were the rightful owners of the suit property and that the registration of the 1st Defendant thereto was fraudulently undertaken.
19. PW1 produced a certified copy of title Kwale/Kidimu /269, the suit property dated 17/10/1995 showing Crysentum Investments Limited the Plaintiff herein as registered as the absolute proprietor; Application for official search and attendant Certificate of Official search both dated 2nd August 2011 confirming that as at the said date the register at the Kwale land office showed the Plaintiff as the registered proprietor since 17/10/1995 and a title deed issued on the same date.
20. Section 26 of the *Land Registration Act* provides as follows; -

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
21. From the foregoing it is clear that the Plaintiff is the registered owner of the suit property from October 1995. However it was PW1 evidence that despite the above they came to discover another registration showing the 1st Defendant as the registered proprietor. This is supported by a Certificate of Official Search dated 3/3/2020 produced as part of the Plaintiff bundle. A perusal of this search reveals that Alesiulis Njeru Nthiga and who is the 1st Defendant was issued with a title deed on 5/11/14. This is confirmed by the certified copy of a green card for Kwale/Kidimu / 269 produced by PW1. The green card also confirms the encumbrance in favor of the 2nd Defendant as alleged by the plaintiffs. PW1 denied having ever parted with the suit property in favor of the 1st Defendant.
22. From the above, it clearly emerges that there are two registered proprietors of the suit property. It is the Plaintiffs case that the 1st Defendant title was issued fraudulently which the Plaintiff attributes to the Defendants. It was incumbent upon the Plaintiff to prove the allegations of fraud to impeach the 1st Defendants title. The particulars of fraud were listed as follows; -
 - a. Registering the parcel of land in the names of the 1st Defendant while having the Knowledge that Plot No. Kwale/Kidimu/269 was registered in the names of the Plaintiff.



- b. Failing to scrutinize the Title Deed, presented by the 4th Defendant which was a clear forgery in view of the existing Original Title Deed in the names of the Plaintiff.
 - c. Failing and or ignoring the green card relating to Plot No. Kwale/Kidimu/269 which indicated the Plaintiff as the registered owner and proceeding to register a charge over the suit Property in favour of the 2nd Defendant.
 - d. Failing to scrutinise the 1st and 4th Defendants documents and proceeding to deal with the entries in the Green Card of Plot No. Kwale/Kidimu/269 despite the existence the green card of Plot No. Kwale/Kidimu/269 in the Plaintiffs' names.
 - e. Proceeding to register entries in the Green Card and issuing the 4th Defendant with a Title Deed, despite the existence of a Title Deed in the names of the Plaintiff.
 - f. Proceeding to accept documents from the 1st, 2nd, 3rd to 4th Defendants for registration despite the existence of a parcel file of Plot No. Kwale/Kidimu/269 in the Plaintiffs names and which information was available to the 1st, 2nd, 3rd and 4th Defendants.
23. It is trite that the standard of proof for fraud is slightly above that of the balance of probabilities see *Central Bank of Kenya Limited vs. Trust Bank Ltd & 4 Others* (1996) eKLR and *Ratil Patel vs. Lalji Makanji* EA 1957 and *Vijay Morjaria vs Nan Sighn Darbar & Ano.* (2000) eKLR. This burden of proof was on the Plaintiff and it did not matter that the 1st and 4th Defendant never entered appearance. As noted in my earlier discussions the Plaintiff led evidence that showed the existence of two separate registered owners to the suit properties. This in itself casts a doubt on the integrity of either of the titles. I say so because there can never be two separate titles on the same property. Section 32 of the *Registered Land Act* Chapter 300 of the Laws of Kenya and which was the applicable law during the registration of both titles stipulates thus; -
- Title deeds and certificates of lease
32. (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:
- Provided that -
- (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;
 - (ii) no title deed or certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five years.
- (2) A title deed or certificate of lease shall be only *prima facie* evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.
 - (3) When there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate, and failing agreement the title deed or the certificate shall be filed in the registry.
 - (4) The date of issue of a title deed or certificate of lease shall be noted in the register.
24. DW1 confirmed in cross examination that there can be no two titles against the same property and should this happen then one must be fake. I'm aware that where a title to land is challenged then the holder and or registered owner must demonstrate the root of their title See the cases of *Munyu Maina*



- vs. Hiram Gathiba Maina* (2013) eKLR and *Samuel Odhiambo Oludhe & 2 Others vs. Jubilee Jumbo Hardware Ltd & Ano.* (2018) eKLR. The Plaintiff title is being challenged by the existence of another title. The history of how the Plaintiff acquired the title is evident in the documents produced by the Plaintiff as well as the 3rd Defendant, Land Registrar Kwale.
25. The Plaintiffs case is that it purchased the suit property. Documents availed support this position both in terms of content and chronology. The letter of consent dated 9/10/95 from the Msambweni Land Control Board shows an application for consent to sale the suit property to Ms. Crysenthum Investments Limited was made on 3/10/95 by Praful K.Shah, Amritlal K.Shah, Jayantlal K.Shah and Sayantlal K. Shah. The ownership of the said vendors title is confirmed by the title deed issued on 8/5/95. The consent was issued pursuant to a meeting of the Board held on 11/10/95. This is followed by a Transfer of Land dated 12/10/95 to the Plaintiff, Crysenthum Investments Limited. The title deed dated 8/6/95 shows it is cancelled and rightly so by dint of the said transfer. Also produced is a letter of consent from the same Board showing Praful K.Shah, Amritlal K.Shah, Jayantlal K.Shah and Sayantlal K. Shah purchased the suit property from Najit K. Noormohamed whose ownership is evidenced by a title dated 10/5/94. The sale is further supported by Transfer of Land dated 7/6/95 and a copy of the cancelled title deed in the name of the said Najit K. Noormohamed.
26. PW1 evidence was that he never sold the property to the 1st Defendant. I note this is supported by the absence of Transfer of Land document in the parcel file held by the land registrar to support such sale and or transfer from the Plaintiff to the 1st Defendant. DW1 did not produce it anyway. It was submitted on behalf of the Plaintiff that the certified true copy of Green card confirmed that the 1st defendant was subsequently registered as the proprietor without the Plaintiffs knowledge. The court agrees with this position. Additionally, the title held by the 1st Defendant is not supported by the parcel file held at the Kwale Land Registry and I agree with Mr. Mwandeje submission in this regard on behalf of the 3rd Defendant. DW1 stated in her evidence in chief that while the parcel file had the transfer dated 12/10/95 in favor of the Plaintiff, there was no transfer or history to show how the 4th Defendant became the owner of the suit property. DW1 upon being referred to the entries No. 9, 10,11 and 12, on the green card produced by the Plaintiff conceded that there must have been entries preceding the same and the absence of the 4th Defendants entry with regard to how he became owner indicated a possibility of fraud. Indeed this lacuna raises eyebrows and which prompted the Land Registrar to summon the two registered owners. This court is persuaded that the 1st defendant title was acquired through fraud.
27. Let me add that the courts have held that where there are two titles the first in time should prevail see *Wreck Motors Enterprises vs. The Commissioner of Lands and Others* Civil Appeal No. 71 of 1997. Also see the case of *Hubert L. Martin & others vs. Margaret J. Kamar & 5 Others* (2016) eKLR where Justice Munyao held that when a court is faced with a case of two titles over the same land and upon interrogation of the two the title to be upheld is that which conformed to procedure and can properly trace its root without breaking a chain. In the present case the Plaintiff has been able to explain the root of its title.
28. I think I have said enough on the ownership of the suit property and its history and which discussions also clearly point to the existence of fraud on the existence of the 1st Defendants and 4th Defendants title who in any case did not avail themselves to defend the same. While this court notes from DW1 testimony that the Registrar upon learning about the facts of this case put in mechanism to rectify improprieties pursuant to the provisions of Section 14(1)(b) of the *Land Registration Act*, or all that has happened in respect of the parcel file must have been aided by officers in the registry.
29. Even assuming I'm wrong on the finding of fraud, the Court finds that the 1st Defendant did not have a good title due to irregularity and illegality in its registration.



30. Clearly flowing from the foregoing the history of the Plaintiff title leaves no doubt that the Plaintiff is the bonafide owner of the property. Having satisfied myself in this regard, I must now determine whether the Plaintiff is entitled to the orders sought.
31. The Plaintiff seeks the following orders;
- a. A mandatory injunction to issue against the Defendants, their agents servants or employees from selling, alienating, disposing further charging and or dealing with Plot No. Kwale/Kidimu/269 to the detriment of the Plaintiff.
 - b. A declaration that the Plaintiff is the owner and proprietor of Plot No. Kwale/Kidimu/269 situated within Shimoni in Kwale County.
 - c. Cancellation of the Title Deed in the names of the 1st Defendant and an order for registration of the Plot No. Kwale/Kidimu/269 in the Plaintiffs names.
 - d. Costs and interest of this suit.
 - e. Any other relief which the Honourable Court thinks fit to grant.
32. Based on the courts discussions it is no doubt that the Plaintiff is the bonafide registered proprietor of the suit property. The court is tasked to make a finding on whether as a result thereof a mandatory injunction should issue. Further whether the Plaintiff should be declared the owner and proprietor of the suit property. I have no hesitation in granting the said reliefs based on my findings and the case having been heard and decided on merit. Article 40 of the Constitution provides for the protection of the right to property and forbids any person from arbitrarily depriving a person of his or her property and which goes with the right to quiet possession and enjoyment.
33. As to cancellation of the title deed the Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR agreed with the trial Court that
- “The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.
34. The court having therefore established that the 1st Defendant title is irregular for the reasons cited it follows therefore that cancellation will issue. The upshot of the above is that this Court finds and holds that the 1st Defendant’s title having been tainted is ripe for cancellation and proceeds to cancel the same.
35. The upshot of the foregoing is that the court finds that the Plaintiff has proved to the required standard that it is the *bonafide* registered owner of the suit property and enters judgment for the Plaintiff against the Defendants jointly and severally in the following terms; -
- a. A mandatory injunction to issue against the Defendants, their agents servants or employees from selling, alienating, disposing further charging and or dealing with Plot No. Kwale/Kidimu/269 to the detriment of the Plaintiff.
 - b. A declaration that the Plaintiff is the owner and proprietor of Plot No. Kwale/Kidimu/269 situated within Shimoni in Kwale County.
 - c. Cancellation of the Title Deed in the names of the 1st Defendant and an order for registration of the Plot No. Kwale/Kidimu/269 in the Plaintiffs names.
 - d. Costs and interest of this suit.



Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 22ND DAY OF JANUARY 2024

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A.E DENA

JUDGE

Mr. Okanga for the Plaintiff

Mr. Penda holding brief Mwandeje for 3rd Defendant

Mr. Daniel Disii – Court Assistant

